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April 10, 2003

**NOTICE OF *EX PARTE*  
PRESENTATION**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW B204  
Washington, DC 20554

**Re: Appropriate Framework for Broadband Access to the  
Internet over Wireline Facilities, CC Docket No. 02-33.**

Dear Ms. Dortch:

The attached written *Ex Parte* Presentation concerning the above-referenced proceeding was sent to William Maher, Wireline Competition Bureau Chief, by the undersigned on April 10, 2003, on behalf of the United States Telecom Association. In accordance with FCC Rule 1.1206(b)(1), this Notice of *Ex Parte* Presentation and a copy of the referenced *Ex Parte* Presentation are being filed with you electronically for inclusion in the public record. Should you have any questions, please contact me at (202) 326-7300.

Respectfully,

A handwritten signature in blue ink, appearing to read "Michael T. McMenamin", is written over a horizontal line.

Michael T. McMenamin  
Associate Counsel

Attachment

cc: William Maher  
Matthew Brill  
Jordan Goldstein  
Daniel Gonzalez  
Christopher Libertelli  
Lisa Zaina

Carol Matthey  
Jane Jackson  
Michael Carowitz  
Cathy Carpino  
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***EX PARTE PRESENTATION***

William Maher, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5 C450  
Washington, DC 20554

**Re: Appropriate Framework for Broadband Access to the  
Internet over Wireline Facilities, CC Docket No. 02-33.**

Dear Mr. Maher:

On April 2<sup>nd</sup>, the United States Telecom Association (USTA) submitted a written *Ex Parte* Presentation to you that addressed itself to the legal and policy bases for affirming the right of incumbent local exchange carriers (ILECs) to provide broadband Internet transport as a common carrier service, private carrier service and as the telecommunications component of an information service such as broadband Internet access service.<sup>1</sup> Here, USTA incorporates the arguments presented in its April 2<sup>nd</sup> letter and addresses several other important issues presented in the notice of proposed rulemaking that initiated this proceeding.<sup>2</sup>

In the Wireline Broadband NPRM, the FCC is examining the appropriate legal and regulatory framework under the Communications Act of 1934, as amended, (the Act) for broadband access to the Internet over wireline facilities. USTA's interest in this proceeding is to ensure that regulatory rules and policies applicable to broadband telecommunications and broadband telecommunications services are equally applied to all broadband providers regardless of the platform or technology employed. Further, USTA wants to ensure that no action taken in this proceeding, or any other FCC proceeding, jeopardizes the continued availability of universal service support mechanisms that are specific, predictable and sufficient.<sup>3</sup>

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<sup>1</sup> See Letter to William Maher, CC Docket No. 02-33, from Lawrence E. Sarjeant, April 2, 2003 (April 2<sup>nd</sup> Letter).

<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-33; 95-20; 98-10, FCC 02-42, Notice of Proposed Rulemaking (rel. Feb. 15, 2002) (*Wireline Broadband NPRM*).

<sup>3</sup> See 47 U.S.C. § 254(b)(5).

The FCC should conclude in this proceeding, consistent with its most recent data release on high-speed services for Internet access,<sup>4</sup> that multiple broadband platforms exist for providing customer access to the Internet, that cable companies are the dominant providers of such service through their cable modem offerings and that ILECs are entitled to regulatory relief by virtue of their non-dominant status and the robust competition that they face in the broadband mass market. The FCC should reaffirm its determination that DSL service is interstate in nature and subject to FCC jurisdiction. Furthermore, the FCC should not allow state and local governments to place restrictive rights-of-way requirements upon broadband service providers. Moreover, regulatory parity should exist between government-owned and privately-owned broadband networks. Finally, the FCC should broaden the base of universal service contributors to include all providers of broadband telecommunications services and broadband telecommunications.

The broadband mass market has several substitutable platforms: wireline, wireless, satellite and cable. According to Business Week magazine, as of June 2002, "cable companies held 62% of the broadband market . . . v. 35% for DSL and 3% for nascent satellite and wireless services."<sup>5</sup> Clearly, inter-modal broadband service providers do exist, but cable broadband is the dominate provider of mass market broadband services in the United States. Unlike ILECs, cable and other mass market broadband providers have *de minimus* regulatory obligations. In order to facilitate competition and "promote the availability of broadband to all Americans," the disparate regulatory treatment of ILECs must be alleviated because it places a severe competitive disadvantage upon ILEC digital subscriber line (DSL) providers. In sum, the FCC should affirm the right of ILECs to respond to this competitive market in a manner that best addresses customer needs by providing broadband Internet transport as a common carrier service, a private carrier service or a telecommunications component of an information service such as broadband Internet access service.

Similar to cable service providers, ILECs must be afforded the opportunity to structure their offerings to the needs of their customers. The current regulatory scheme is suppressing ILEC investment in new and innovative broadband services to consumers. ILECs wishing to offer broadband transport via private carriage or as a telecommunications component of a single integrated Internet access service, should be permitted to do so consistent with FCC precedent.<sup>6</sup> USTA also believes that the legal analysis put forth in the *Cable Declaratory Ruling* allows ILECs to continue providing DSL service as common carriage.<sup>7</sup> If the option to offer broadband

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<sup>4</sup> See NEWS, Federal Communications Commission Releases Data On High-Speed Services For Internet Access, released December 17, 2002.

<sup>5</sup> See *Behind the High-Speed Slowdown*, Business Week Magazine (Sept. 17, 2002).

<sup>6</sup> See April 2<sup>nd</sup> Letter (providing the legal justification for the FCC to rule consistent with the law that ILECs providing private carriage or telecommunications component of a single integrated Internet access service should be allowed to provide broadband services in the same fashion as cable modem providers).

<sup>7</sup> See *Id.* (citing the legal analysis put forth in the *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling*, GN Docket No. 00-185, FCC 02-77 (rel. Mar. 15, 2002)).

services via common carriage is denied, the levels of broadband deployment in rural America will recede because rural carriers will not have the flexibility they need to provide affordable broadband services. By providing ILECs the flexibility to select the regulatory framework with which to provide broadband, they will have incentives to and be able to continue to deploy broadband competitively. Spurring economic development and growth is vital to the nation, and DSL and other broadband services are key economic and growth drivers. The increased flexibility for wireline providers to structure their broadband services as integrated or non-integrated offerings to end users will facilitate national broadband deployment objectives.

In order to ensure national broadband deployment, the FCC should reaffirm its prior determination that DSL service used to provide access to the Internet is interstate in nature and subject to FCC jurisdiction. This determination is unaffected by a determination that broadband service used to provide Internet access is an information service. It is imperative that there be one national broadband policy and not multiple, and possibly inconsistent, state broadband policies. Providing states with the opportunity to assert jurisdiction over broadband will assure the imposition of unwarranted regulations and costs on wireline carriers. Such a result would only serve to discourage ILEC broadband investment and limit consumer choice.

Likewise, municipalities should not be permitted to impose new burdensome rights-of-way requirements on broadband providers. The provisioning of broadband services will not impose any additional burden on local rights-of-way or costs on municipalities. To the extent that state and local governments have a legitimate public health, safety and welfare interest in managing state and local rights-of-way, the FCC must restrict the ability of states and local governments from imposing unreasonable and unnecessary restrictions and costs upon broadband service providers that seek to deploy broadband facilities.

Moreover, government-owned broadband networks should be subject to the same regulation as privately owned firms engaged in providing broadband services. When providing broadband services, the government should properly account for its cost of providing service, including the imputation of the costs of taxes, fees and other obligations applied to private broadband providers.

Finally, the preservation of specific, predictable and sufficient universal service support mechanisms must be a critical objective for the FCC. Exempting certain or all broadband services from supporting USF would undercut the availability of sufficient USF support going forward. There are parts of the Nation that would be without affordable telephone service if universal service high cost support was insufficient to meet the needs of qualifying high cost local service providers. In order to ensure the future sufficiency of universal service support, the FCC should conclude that all broadband and broadband services (common carrier broadband transport services, private carriage broadband transport services and broadband-based information services) must contribute to USF support mechanisms pursuant to section 254(d) of the Act.<sup>8</sup> All broadband providers should contribute to universal service support mechanisms

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<sup>8</sup> 47 U.S.C. § 254(d).

on a competitively neutral basis. This would allow the FCC to proceed with its classification of cable modem service and wireline broadband Internet access service as information services, while broadening the base of USF support and better ensuring the availability of a sufficient funding base for universal service-supported programs into the future.

Inter-modal competition in the provisioning of broadband services exists. Yet, because of the continued disparity in the regulatory treatment of ILEC-provided broadband relative to the treatment of other broadband providers like cable companies, ILECs are disadvantaged in serving the broadband mass market. This is unfair to ILECs and hinders the ability of ILECs to expand the reach of their mass market broadband offerings. Broadband providers offering functionally equivalent services should be accorded the same regulatory treatment. All broadband service providers should be subject to limited regulatory obligations (universal service support is one of those limited obligations) in light of the level of broadband competition that exists. The FCC should, in this proceeding, take action that produces regulatory parity among providers in the broadband mass market and allows broadband providers the flexibility to offer their services in a manner best suited to the particular geographic markets that they serve.

Respectfully,



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Michael T. McMenamin  
Associate Counsel

Attachment

cc: Matthew Brill  
Jordan Goldstein  
Daniel Gonzalez  
Christopher Libertelli  
Lisa Zaina  
Carol Matthey  
Jane Jackson  
Michael Carowitz  
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